*** HON'BLE SRI JUSTICE V.V.S.RAO**

+ WRIT PETITION No.16713 of 2005

%Dated 15-09-2006

M/s.Yella Constructions Limited

… Petitioners.

VERSUS

$ The East Coast Railway, Rail Vihar, Chandrasekharpur, Bhubaneswar, rep.by its General Manager and others.

… Respondents.

! Counsel for Petitioners: Sri D.V.Sitarama Murthy

^Counsel for Respondents: Sri S.R.Ashok

<GIST:

>HEAD NOTE:

? Cases referred

1. 2003 (2) ALD 392
1. AIR 1996 SC 2005
3. (2003) 6 SCC 1
4. AIR 1986 SC 1370
5. (1988) 3 Comp.LJ 1 (SC)
6. 1897 Appeal Cases 22 = (1895-1899) All ER 33
7. (1995) 1 SCC 478

8. (1947) 2 All ER 640
9. (2001) 2 SCC 386 = AIR 2000 SC 3689

THE HON'BLE SRI JUSTICE V.V.S.RAO

WRIT PETITION NO.16713 OF 2005

DATED 15TH SEPTEMBER, 2006

BETWEEN:

M/s.Yella Constructions Limited

… Petitioner

AND

The East Coast Railway, Rail Vihar, Chandrasekharpur, Bhubaneswar, rep.by its General Manager and others.

… Respondents

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THE HON'BLE SRI JUSTICE V.V.S.RAO

WRIT PETITION No.16713 OF 2005

ORDER:

INTRODUCTION

M/s.Annapurna Rail S&T Construction Limited is a company registered on 11.06.1998 under Indian Companies Act, 1956. It was incorporated with the main object of carrying on business of undertaking contract works especially Signalling and Telecommunications (S&T)

works with Indian Railways. On 10.02.2004, the name of the said company was changed as M/s.Yella Construction Limited (the petitioner herein). As per the Memorandum and Articles of Association, there are six shareholders including M/s.Y.Raghavaiah and Y.Venkata Lakshmi. There are four Directors in the Board of Directors of the company including Y.Raghavaiah. The company filed the instant writ petition seeking a writ of Mandamus declaring the order/letter, dated 21.07.2005 issued by the Chief Signal and Telecom Engineer (Projects), East Coast Railway, Bhubaneswar – the third respondent herein. By the said letter, M/s.Annapurna Rail S&T Construction Limited, Visakhapatnam (as the petitioner company was known earlier) was informed that the Ministry of Railways (Railway Board) by letter No.2002/SIG/B/8, dated 12.06.2003, decided that the business dealings with M/s.Annapurna Construction, Vijayawada and also their sister concerns and partners/shareholders should be banned on all Indian Railways and organizations for a period of five years with effect from 28.05.2003 and therefore, the business dealings with the petitioners are banned for a period of five years as "some of the partners of M/s.Annapurna Construction, Vijayawada are appearing in the Memorandum and Articles of Association of the petitioner company". This writ petition is filed mainly contending that the petitioner company being an independent entity has its own identity different from Annapurna Construction, Vijayawada and that it has nothing to do with Annapurna Construction, Vijayawada.

BACK GROUND FACTS

The pleadings on record are aplenty by way of affidavits, counter, reply and rejoinder affidavits. There is, however, not much dispute about the constitution and functioning of three firms/concerns and business they were concentrating on. Therefore, it is necessary to notice this aspect of the matter having regard to the allegation made by the respondents that the firm at Visakhapatnam is sister concern of the firm at Vijayawada. This is necessary because the opposite parties agree that the axe of ban can only fall on the petitioner company if it is indeed the sister concern of Vijayawada firm and not otherwise. If the petitioner or its precursor is not a sister concern of Vijayawada firm, the whole exercise leading to the issue of impugned letter by the third respondent would be irrational, illegal and arbitrary.

(i) Annapurna Constructions, Vijayawada

M/s.Annapurna Constructions, Vijayawada (hereafter called,

Vijayawada firm) is a partnership firm started from 01.04.1990 but a formal partnership deed was executed on 21.02.1991. This firm was started by two families, namely, Yella family and Idulapati family. Idulapati Srinivasa Rao as Managing Partner and his father Radhakrishna Murthy represented Idulapati family. Yella Koteswara Rao and Yella Annapurna represented Yella family. Be it noted, these two are younger brother and mother of one Yella Raghavaiah. The two families have a major share in the firm besides two other partners. The partnership was at Will. It was to operate from premises bearing door No.60-17-8, Navodaya colony, Vijayawada-10 "to do business in contracting works in Government Departments as well as private parties and to do any other business as may be decided by the partners advantageous to the firm". The Managing Partner, who was authorised to file tenders and enter/sign agreements and books on behalf of the firm. This firm was reconstituted under partnership deed, dated 21.03.1992 with effect from 01.04.1991 with nine partners. These include three members from Idulapati family, namely, SrinivasaRao, S/o Radhakrishna Murthy; Radhakrishna Murthy and Padma Latha, D/o Radhakrishna Murthy. The re-constituted firm also included three members of Yella family – Koteswara Rao, Annapurna, W/o Mallikarjuna Rao and Venkata Lakshmi, W/o Raghavaiah. There are three other partners not relating to either of the two families. In this arrangement Yella family had 3/9th share and Idulapati family had 3/9th share. There is no dispute or denial that this firm was registered by the Registrar of Firms, Government of Andhra Pradesh, with Registration No.09033. Be it also noted that this firm was in existence and was doing business with Indian Railway as contractors for supplying and executing various S&T work. It is brought to this Court that recently this firm has been dissolved, which has, however, no bearing on the issue in this writ petition.

(ii) M/s. Annapurna Constructions, Visakhapatnam

(M/s.Annapurna Constructions, Visakhapatnam (hereafter called, Vizag firm) was constituted under a partnership deed, dated 04.07.1995, with six partners. M/s.Raghavaiah, Koteswara Rao and Annapurna, sons and wife of Yella Mallikarjuna Rao and Venkata Lakshmi, wife of Raghavaiah had major share whereas Idulapati Srinivasa Rao and Idulapati Radhakrishna Murthy are the two other partners. Yella family had 70% and Idulapati family had 30% share in Vizag firm, which was incidentally constituted for the same purpose, for which Vijayawada firm was constituted, namely, execution of all types of

works contracts i.e., Civil/Electrical/Mechanical and was to function from the premises with door No.30-5-9, Krishna Gardens (later from door No.49-27-60, Madura Nagar, Visakhapatnam). Yella Raghavaiah was the Managing Partner of the firm. The firm was re-constituted on 17.12.1996, 16.10.1999, 10.09.1999 and 28.04.2003 either by reason of the death or retirement of one or other partner/partners. There was transfer, re-transfer and/or relinquishment of the shares of some of the partners and the details of the same are not necessary here.

(iii) M/s.Annapurna Rail S&T Contract Limited

(M/s.Yella Constructions Limited – petitioner)

M/s.Annapurna Rail S&T Construction Limited (hereafter called, Vizag company) is a company incorporated as noticed supra. Yella Raghavaiah, his wife – Venkata Lakshmi, and mother Annapurna as well as Idulapati Srinivasa Rao and his father Radhakrishna Murthy besides five others are initial subscribers of the company when the Memorandum of Association was submitted to Registrar of Companies, wherein Yella Raghavaiah was the Managing Director. The company was incorporated on 12.05.1998 and commenced its operations with the same business, namely, execution of signal and telecommunication contracts for Railways. Subsequently, in October, 1999, the two parties to Idulapati family, who are signatories to Memorandum of Asociation transferred their shares to Raghavaiah and resigned from the company. By that date, Vizag firm had works on their hand and therefore, a Memorandum of Understanding (MoU) was entered into on 07.12.2002 between Vizag firm and the petitioner company for taking over certain works from the former to the latter in 2002. Venkata Lakshmi and Annapurna transferred their shares in favour of Raghavaiah and be it also noted that as seen from a number of documents, Vizag firm also used the firm Registration No.09033 on their letter pads and in their correspondence employers.

The respondents filed a detailed counter affidavit sworn to by the third respondent asserting that Vijayawada firm and Vizag firm are one and the same, that both were using registration Number, that Yella Raghavaiah was mainly conducting business on behalf of both the firms, and that both the firms are family concern of Yella Raghavaiah. Elaborate reference is made in the counter affidavit to different partnership deeds and other aspects of the matter to bring out that both the firms are one and the same.

SUBMISSIONS

The learned counsel for the petitioner company Mr.D.V.Sitarama Murthy argued that when the impugned order was issued in July, 2005,

by the third respondent based on the decision of the Railway Board in June, 2003, the petitioner company was incorporated entity having its own identity, perpetual succession and nature as a juristic person, and therefore, the same cannot be treated as a sister concern of either Vijayawada firm or Vizag firm. According to the learned counsel, even if negligible number of partners in Vijayawada and Vizag firms as well as the subscribers to Memorandum of Association of petitioner company (on its inception) are same, the same does not lead to any conclusion that the petitioner company and its predecessor firm are sister concerns of Vijayawada firm. A strenuous submission is made that the alleged misconduct of Vijayawada firm in supplying goods to Railways through dubious means, cannot be the basis for banning business dealings with the petitioner company. Such decision is arbitrary and violative of Articles 14 and 19(1)(g) of Constitution of India. Nextly, it is the submission of the learned counsel for the petitioner, after the formation of the company in 1998, with the approval of the Railways, the petitioner company entered into MoU with its predecessor firm, that it has completed all the works to the satisfaction of the employer and was also awarded S&T works continuously, which would mitigate against any allegations of misconduct by the Vizag firm. Learned counsel placed reliance on the decision of this Court in **Krishi Foundry Employees Union v Krishi Engines Limited**[1] in support of the contention that the principle of lifting the veil cannot be applied when a concern is an incorporated company regulated by company law.

Learned Senior Counsel for respondents, Sri S.R.Ashok, submits that Vijayawada firm and Vizag firm are not two firms but only one firm, the latter being the branch of the former. He would like this Court to draw an inference from the events that followed the constitution of Vizag firm in 1995 and later converted into a private limited company only to avoid disciplinary action against Vijayawada firm for resorting to dubious means in execution of the works. The enquiry was initiated immediately after the Railways found out the fraud committed by Vijayawada firm and when the action was in the pipeline, the other partners led by Yella Raghavaiah started Vizag firm. According to the learned senior counsel, lifting the veil, one can find that there are business practices scrupulously followed by Vijayawada and Vizag firms to show that both the firms are one and the same though for various purposes, there was different combination of partners in each of the firm. He placed reliance on the correspondence addressed by Raghavaiah showing the registration

number of Vijayawada firm and the certificates filed by Vizag firm claiming the experience of Vijayawada firm as its own experience for the purpose of eligibility to tender. Learned senior counsel placed reliance on the decisions of the Supreme Court in **Delhi Development Authority v Skipper Construction Company (Private) Limited**[2] and **Kapila Hingorani v State of Bihar**[3].

POINT FOR CONSIDERATION

The point for consideration is whether the Railway Board and Chief S&T Engineer (Projects) were not justified in treating the petitioner company as a sister concern of M/s.Annapurna Constructions, Vijayawada. Before considering this question, it is necessary to notice the allegations made against Vijayawada firm and the gravity of such allegations.

The Deputy Chief Signal and Telecom Engineer, Vijayawada of South Central Railway entered into agreement with Vijayawada firm for supply of Siemens Point Contractor Relay Units, which are proprietary articles of M/s.Seimens Limited to the Railways. During the years 1993-1994 Vijayawada firm supplied seven (7) numbers of Relay Units under agreement No.B/SG/CN/Agt.6/90-91, dated 28.06.1990 vide delivery challan No.Nil, dated 07.12.1993. Subsequently, the employer found that Vijayawada firm had obtained used Point Contractor Relay Units by dubious means from Railways and had supplied the same to the Railways as if genuinely procured from M/s.Seimens Limited. Government of India in Ministry of Railways (Railway Board) issued a statement of imputations against Vijayawada firm vide Memorandum No.2002/SIG/B/8, dated 19.9.2002. The said firm was required to submit an explanation/representation as to why Government of India should not ban business dealings with the firm and also with their allied/sister concerns/partners on all Indian Railways for a period of five years. Vijayawada firm did not submit any explanation to memorandum of imputations and, therefore, Government of India came to conclusion that the firm supplied Relay Units through dubious means and decided to ban business dealings with Vijayawada firm and its sister concerns/partners for a period of five years with effect from 28.5.2003. Consequent thereupon, third respondent issued impugned letter to M/s.Annapurna Rail S&T Construction Limited, Visakhapatnam, the petitioner company herein.

A reading of the memorandum of imputations and the orders

passed by the Railway Board as well as the third respondent would show that Vijayawada firm adopted dubious means in supplying Seimens Relay Units. They procured old units from Railways presumably by clandestine means and again supplied them to the Railways as if they were procured from M/s.Seimens Limited. Therefore, there can be no mitigating circumstances to exonerate Vijayawada firm nor can it extricate itself from bad reputation it earned by adopting dubious means. The question however remains as to whether any other firm having partners of Vijayawada firm as partners or shareholders can be treated as allied/sister concern of Vijayawada firm and for that reason, can it be banned from having business dealings with the Railways. Here the learned senior counsel would urge that piercing/lifting the corporate veil of the three concerns must be treated as sister concerns and, therefore, for misconduct on the part of one firm/ concern others should also be banned from having business dealings with Railways. Learned counsel for the petitioner however contends that the petitioner being an independent corporate entity can never be treated as sister concern of Vijayawada firm or Vizag firm. The controversy can be appreciated by making reference to settled principles of piercing/lifting corporate veil as applied in business law.

In Volume 32A of Words and Phrases (West Publishing Company – third reprint 1989 p.84) the term "piercing the corporate veil" is described as, *"the Court's unwillingness to permit corporate presence and action to divert judicial course of applying law to ascertain facts"*. When this principle is invoked, it is permissible to show that the individual hiding behind the corporation is liable to discharge the obligations ignoring the concept of corporation as a separate entity. Generally, an incorporated company is liable as a juristic person. It is different from its shareholders and directors of the Board of Company. The acts of malfeasance and misfeasance and acts of misdemeanor by the shareholders and directors of a corporation (company), do not always bind the company as such. However so as to apply law to ascertained facts, judicial process can ignore juristic personality of the company and haul-up the directors and in certain cases even shareholders to discharge the legal obligations. When the corporate veil is lifted/pierced, it only means that the Court is assuming that the corporate entity of a concern is a sham to perpetuate the fraud, to avoid liability, to avoid effect of statute and to avoid obligations under a contract. But enter a caveat; almost always the incorporated company cannot be equated into

shareholders/directors and it is only occasionally the corporate veil of the company is pierced "in order to find out the substance only where it is permitted by the statute or in exceptional cases of fraud".

In **Life Insurance Corporation of India v Escorts Limited**[4], the Supreme Court laid down that, "the corporate veil may be lifted where a statute contemplates or fraud or improper conduct is intended to be prevented or a taxing statute or a beneficent statute is sought to be evaded or where associated companies are inextricably connected as to be, in reality, part of one concern." In **State of U.P. v Renusagar Power Company**[5] the Supreme Court after referring to **Life Insurance Corporation of India** (supra), declared the law thus; "it is high time to reiterate that in the expanding horizon of modern jurisprudence, lifting of corporate veil is permissible. Its frontiers are unlimited. It must, however, depend primarily on the realities of the situation." In **Skipper Construction Company (Private) Limited** (supra), the Supreme Court referred to the principle of lifting corporate veil. After referring Palmer's Company Law as well as Modern Company Law by Gower, it was observed as under.

> The concept of corporate entity was evolved to encourage and promote trade and commerce but not to commit illegalities or to defraud people. Where, therefore, the corporate character is employed for the purpose of committing illegality or for defrauding others, the court would ignore the corporate character and will look at the reality behind the corporate veil so as to enable it to pass appropriate orders to do justice between the parties concerned. The fact that Tejwant Singh and members of his family have created several corporate bodies does not prevent this Court from treating all of them as one entity belonging to and controlled by Tejwant Singh and family if it is found that these corporate bodies are merely cloaks behind which lurks Tejwant Singh and/or members of his family *and* that the device of incorporation was really a ploy adopted for committing illegalities and/or to defraud people.

In **Kapila Hingorani** (supra), the Supreme Court was concerned with the vicarious liability of Government of Bihar for payment of arrears of salaries to the employees of State owned Corporation/public sector undertakings/statutory bodies, who were not paid salaries for periods ranging from 3 to 12 years. The opposition from the State of Bihar came in the contention that all the State owned Corporations being juristic persons, their rights and liabilities must be determined thereof and not *de hors* the same. The State undertakings are not agents of the State Government. That was the theme of the argument. The Supreme Court

indeed accepted the same by referring to the earlier case law. In considering this aspect, the Supreme Court then adverted to piercing/lifting of corporate veil. A reference was made to **Renusagar Power Company** (supra), wherein it was held that whenever a corporate entity is opposed in an unjust and inequitable purpose, the Court would not hesitate to lift the veil and look into the realities so as to identify the persons who are guilty and liable thereof. Then the Supreme Court observed that the State may not be liable in relation to the day-to-day functioning of the companies but its liability would arise on its failure to perform the constitutional duties and functions of public sector undertakings as in relation thereto lie the State's constitutional obligations as, "State acts in a fiduciary capacity." The observations relevant are as follows.

> It is now well settled that the corporate veil can in certain situations be pierced or lifted. The principle behind the doctrine is a changing concept and it is expanding its horizon as was held in State of U.P. v. Renusagar Power Co. The ratio of the said decision clearly suggests that whenever a corporate entity is abused for an unjust and inequitable purpose, the court would not hesitate to lift the veil and look into the realities so as to identify the persons who are guilty and liable therefor. … …
>
> … …The corporate veil indisputably can be pierced when the corporate personality is found to be opposed to justice, convenience and interest of the revenue or workman or against public interest. (See CIT v. Sri Meenakshi Mills Ltd.[28], Workmen v . Associated Rubber Industry Ltd.[29], New Horizons Ltd. v. Union of India[30], State of U.P. v. Renusagar Power Co., Hussainbhai v. Alath Factory Thezhilali Union[31] and Secy., H.S.E.B. v. Suresh[32].)

Thus, the "frontiers of lifting corporate veil" are unlimited (See **Renusagar Power Company** [supra]). It can always be pressed into service by the Court to see that no person defeats equity by resorting to fraud or misrepresentation. Corporate veil can be pierced when behind the mask of the juristic person, there are human agents, who by many permutations and combinations in business establishment get wrongful gain, which ultimately heckles rule of law. The Court can even lift the corporate veil to identify those persons behind the corporate personality, who by their manipulation tend to demean the principles of justice and ethical business practices. The principle of "piercing or lifting corporate veil" in ways more than one, has diluted classical statement of law in **Aron Salomon v. Salomon and Co. Ltd.,**[6] to the effect that, "the

company is at law a different person altogether from the subscriber … … and the company is not agent of the subscribers nor are the subscribers as members liable in any shape or form." Among several exceptions to this rule in corporate law, piercing corporate veil is extraordinary exception used in exceptional cases where persons behind the mask of juristic person use the corporate entity for unethical ends.

BASIS AND JUSTIFICATION FOR IMPUGNED ACTION

There is no challenge to the decision of the Railway Board to disqualify Vijayawada firm from tendering for railway works for quinquennium. The respondents issued a notice by way of memorandum of imputations and having failed to receive any explanation from the firm came to the conclusion that Vijayawada firm played fraud in supplying seven (7) Nos. of Point Contractor Relay Units of Seimens make during 1993-1994 under agreement dated 28.6.1990. While doing so, respondents also banned Vizag company from tendering for railway works on the ground that it is a sister concern. Hence, it becomes necessary to know who are the persons that promoted Vizag company and whether such persons had any relationship with Vizag firm as well as Vijayawada firm. Whether these persons behind the corporate mask of Vizag company should face serious consequences that befallen on Vijayawada firm – whatever the shape and colour and mode, such persons project for their business dealings? That is the incidental question, which would be almost a natural corollary.

Vizag company was incorporated on 12.5.1998 with Registration No.01-29389 and commenced its business with effect from 11.6.1998 as per the certificate of commencement of business issued by the Registrar of Companies, Hyderabad (RoC), pursuant to Section 149(3) of Companies Act, 1956. The company changed its name to L.R. Constructions as per the fresh certificate of incorporation issued by RoC on 10.2.2004. The Chartered Company Secretary has given a certificate giving details of the shareholders, first Directors, Subsequent Directors etc, which is filed by the respondents before this Court. As per the certificate, when the company was incorporated on 12.5.1998, there were nine subscribers to Memorandum of Association (MoA) including Y.Raghavaiah, his wife Venkata Lakshmi and his mother Y.Annapurna apart from I.Radha Krishna Murthy and his son I.Srinivasa Rao. Y.Raghavaiah, Venkata Lakshmi and I.Srinivasa Rao were first Directors at the time of incorporation as per the Article 85C of Articles of

Association and subsequently M/s.Annapurna, Venkata Lakshmi, R.L.N.Rao, Ch.Vijaya Lakshmi and D.N.S.Venkata Ramana Gupta were appointed to the Board of Directors. By September 2004, Annapurna, Srinivasa Rao and Venkata Lakshmi ceased to be the Directors. By that time, the authorized share capital of the company which stood at Rs.5,00,000/- divided into 5000 equity shares of Rs.100/- each was increased to Rs.2.00 Crores divided into two lakh shares of Rs.100/- each. Raghavaiah held 54430 shares and his son held 350 shares. Thus more than 25% of the Company's share capital was held by Y.Raghavaiah and his son. Therefore, it can be presumed that the petitioner company was entirely the corporate face of Raghaviah. There cannot be any dispute on this.

As noticed when the company was initially incorporated in 1998, I.Radhakrishna Murthy, his son Srinivasa Rao, who was also partner in Vizag firm were shareholders and indeed I.Srinivasa Rao was Director from May 1998 till September, 2001. So to say the Vizag company was also controlled by Yella family and Idulapati family. Raghavaiah, who was the Managing Partner of Vizag firm (in which Idulapati Radha Krishna Murthy and his son Srinivasa Rao were partners), was also the Managing Director of Vizag company. This only means that till Vizag firm was dissolved on 28.4.2003 and reconstituted with Raghavaiah and one Ch.Vijaya Lakshmi possessing share of 90% and 10% respectively, Raghavaiah alone was in the saddle of firm as well as company at Vizag. As noticed, in the reconstituted Vijayawada firm the mother and wife of Raghavaiah were silent partners and thus Raghavaiah also had a say in the affairs of Vijayawada firm as was the case of I.Srinivasa Rao, who was a partner in Vijayawada and Vizag firms as well as the Director in Vizag company. The arrangement appears to be that Yella family would control Vijayawada firm and Idulapati family would control Vizag firm as well as Vizag company. Though not very intricate, the balance was maintained presumably to share the profits and losses. This becomes clear by reference to the MoU entered into by and between Vizag firm and Vizag company on 07.12.2002. Under the said MoU, which was with the approval of the Railways, it was agreed as follows.

AND WHEREAS, both the parties have agreed for the following, viz.,

1. That the party to the first part, a company consisting three directors, viz., Sri Y.Raghavaiah, Smt.Y.V.Lakshmi and Smt.Y.Annapurna and these three individuals are the partners of the firm the party to the second part, having 100% controlling

interest.

2. In view of the future enlistment and growth expected in varioud Departments of Central Government authorities it was agreed that the party to the second part to discontinue its business operations.
3. However, the works under progress, which are not mentioned in Para 8 below, executing by the party to the second part shall be completed in all respects, by itself, thereafter the credentials against these works shall be transferred to the party to the first part.
4. Accordingly, the party to the first part wishes to succeed the business hitherto carried on by the party to second part.
5. That the party to the first part is entitled to file all the tenders and make correspondence with all the Government departments and to enjoy the entire credentials and seniority as the case may be the party to the second part was having till date.
6. That, all credit facilities (both fund based and non-fund based limits) with State Bank of India, Main Branch, Visakhapatnam, shall be assumed in the hands of the party to the first part after obtaining necessary consent from the bankers, the party to the first part may be entitled to execute the documents with them as the case may be.
7. That, the party to the first part has been authorized by this MoU to make all correspondence with all the Railway authorities.
8. The work orders those were awarded to the party to the second part viz[7].,
   i) L.O.A.No.CSTF/CON/BBS/OT/87/BRST-MLT/21, dt.31.10.02
   ii) L.O.A.No.CSTF/CON/BBS/OT/88/MWQ-PUI/22, dt.31.10.02
   iii) L.O.A.No.CSTF/CON/SDP/OUTDOOR/2/2002/159, dt.6.11.02

   are hereby agreed to be executed by the party to the first part and all the formalities for executing the same shall have to be obtained by the party to the first part only.
9. Also, the tenders which were filed by the party to the second part and the same are in consideration from SE/Rly., shall be executed (if awarded), by the party to the first part, for this, necessary correspondence shall be made by the party to the first part.

The MoU dated 07.12.2002 referred to hereinabove would show that for all practical purposes Vizag firm and Vizag company were engaged in the same business and the future works expected to be

allotted to the Vizag firm were also to be executed by the Vizag company. Clause 8 of the MoU refers to the works awarded to Vizag company and clause 9 refers to the works to be awarded to the Vizag firm. Was there any connection between the Vizag firm and Vizag company in this regard. The learned Senior Counsel appearing for respondents points out that Yella Raghavaiah, who was the partner of Vizag firm and Managing Director of Vizag company was also looking after the business of Vijayawada firm and whenever tenders were submitted by Vizag firm, Yella Raghavaiah was using the registration number of Vijayawada firm though Vizag firm was also registered under Section 58 of the Indian Partnership Act, 1932 (Partnership Act, for brevity) on 26.6.1999 vide serial (Regn.) No.09033/1995. Learned Standing Counsel also submits that Vizag firm also claimed eligibility qualification by enclosing credential certificates of Vijayawada firm, when they submitted tenders, to Indian Railways for supply and execution of S&T works. Documents are produced before this Court in support of the said submission. Some of them are referred to herein below.

A. Correspondence with Railways:

i) Letter No.APC/PAT.SHIP DEED/10, dated 21.10.1999: This is a communication from Y.Raghavaiah, Y.Venkata Lakshmi and Y.Annapurna to Divisional Signalling & Telecommunication Engineer (Construction) (DSTE), South Central Railway, Vijayawada informing that consequent on dissolution of firm, new partnership deed has been entered into and requesting the addressee to record the changes. This letter was addressed on the letter-pad of Vizag firm.

ii) Letter No.Nil, dated 07.12.2000: This is a communication addressed by Y.Raghavaiah to Senior DSTE/Projects, Vijayawada requesting for release of security deposit. This is addressed on the letter-pad of Vijayawada firm with Registration No.09033, No.9, Padmanabha Buildings, Gandhi Nagar, Vijayawada. At the bottom of the letter, it is mentioned that Head Office of Vijayawada firm is situated at No.49-27-60, Madhuranagar, Visakhapatnam.

A close look at the two letters would show the following.

a) Registration number of Vizag firm and Vijayawada firm is the same i.e., 09033.

b) Address of Vizag firm is mentioned in the first of the above two letters D.No.49-27-60, Madhuranagar,

Visakhapatnam and the same address is mentioned at the bottom of the second letter describing the same as Head Office of Vijayawada firm.

c) APGST No.VSP 08/2/2200.CST No.VSP 08/2/1764, dated 21.9.1995, printed in the bottom of the letter-pad of Vizag firm used for addressing the first letter, is also mentioned at the bottom of the second letter, as if the APGST/CST number of both the firms is the same and Vijayawada firm is branch office of Vizag firm.

d) These two documents would clinchingly show that the two firms one at Vijayawada and another at Vizag and after the incorporation of Vizag company, they were in reality one and the same sharing various works entrusted to them by the Railways.

B. Use of credentiality certificates

i) South Eastern railway issued tender notice No.S&T/CON/BBS/Open Tender/24, dated 27.9.1996 for the works of electrical, telecommunication and signaling in connection with doubling at Rajathgarh, Machapur, Gurudijhatia in Kur Division of South Eastern Railway valued at Rs.1,36,13,257/-. Y.Raghavaiah, Managing Partner of Vizag firm submitted the tender on the letter-pad of Vizag firm. APGST/CST number is the same as found on the letter-pad of Vijayawada firm referred to herein above. In the letter dated 26.10.1996 addressed by Y.Raghavaiah to Dy.CSTE-CON, South Eastern Railway, Bhubaneswar, while submitting the tender, they also referred to address of Vijayawada firm situated at Shop No.1, Padmanabha Buildings, Gandhi Nagar, Vijayawada, as mentioned in the letter-pad of Vijayawada firm, as mentioned herein above. Secondly, while submitting the tender, Y.Raghavaiah as Managing Partner of Vizag firm enclosed the experience certificate issued by Senior DSTE in favour of Vijayawada firm.

ii) South Eastern Railway issued tender notice dated 07.10.1997 for the works of S&T in connection with doubling of one section of Kur Division in South Central Railway, valued at Rs.1,08,74,280/- in pursuance thereto, again, Y.Raghavaiah, Managing Partner of Vizag firm submitted tender vide letter dated 01.11.1997 on the letter-pad of Vizag

firm. In this letter also, address of Vijayawada firm mentioned at the bottom along with same APGST/ CST number. Again, here also the certificates dated 19.11.1995, 20.11.1995 and 19.11.1996 issued by Senior DSTE in favour of Vijayawada firm and certificated dated 20.8.1994 issued by Dy.CSTE-CON, South Central Railway, Rayagada, in favour of Vijayawada firm were enclosed to claim credentials.

iii) South Central Railway issued tender notice dated 03.6.1998 for execution of outdoor signaling works in connection with replacement of existing lever frames and ground gears by route relay interlocking at Simhachalam. Y.Raghavaiah submitted tender vide letter dated 29.7.1998 on a plain paper showing Registration No.09033. The certificate of experience dated 30.5.1998 issued by Senior DSTE, Guntakal, in favour of Vijayawada firm was enclosed.

The documents pursuant to the tender applications and experience certificates were filed before this Court along with additional affidavit of Chief Signal & Telecom Engineer (Projects), East Coast Railway, Bhubaneswar (the third respondent) on 19.6.2006. The petitioner has filed a rejoinder to the additional affidavit. It is stated that by the date of filing of tenders, pursuant to tender notices dated 27.9.1996, 07.10.1997 and 03.6.1998, referred to herein above, I.Srinivasa Rao and Radha Krishna Murthy, major shareholders in Vijayawada firm were also partners in Vizag firm. Therefore, their individual experience was cited by Vizag firm.

C. Other acts of the parties

When Vizag company was incorporated on 12.05.1998, I.Srinivasa Rao, I.Radhakrishna Murthy, Y.Venkata Lakshmi and Y.Annapurna, who are partners of reconstituted Vijayawada firm (partnership deed, dated 21.03.1992) were also figured as promoters/signatories to the Memorandum of Association of the petitioner company. Further more, there is no denial that on 18.02.2000, Y.Raghavaiah, his wife Y.Venkata Lakshmi and his mother Y.Annapurna gave a public notice through their lawyer, which reads as under.

PUBLIC NOTICE

Under instructions of our clients Shri Y.Raghavaiah, his wife Smt.Venkata Lakshmi and his mother smt.Annapurna as partners, Door No.49-27-60, Madhuranagar, Visakhapatnam whose principal business is Railways Contracts, in particular in Signalling and Telecommunication Works, trading under the name and style as **M/s.Annapurna Constructions**.

Previously our clients along with Shri I.Srinivasa Rao and Shri I.Radhakrishna Murthy were carrying on business as Contractors under the name and style **M/s.Annapurna Constructions**. Shri I.Srinivasa Rao and Shri I.Radhakrishna Murthy were minor share holders 20% and 10% interest in **M/s.Annapurna Constructions**.

By a dissolution deed dated 16th October, 1999, Shri I.Srinivasa Rao and Shri I.Radhakrishna Murthy having received Rs.10 Lakhs from our clients executed a dissolution deed in favour of our clients and our clients alone are entitled to continue the business under the name and style **M/s.Annapurna constructions**.

Hence public are hereby informed that Shri I.Srinivasa Rao, son of Shri Radhakrishna Murthy and Shir I.Radhakrishna Murthy, son of Sivayya have nothing to do with **M/s.Annapurna constructions** and they cannot use the name of **M/s.Annapurna constructions**. It seems they are trading under the name of M/s.Srinivasa Constructions and making false assertions and using the credentials of **M/s.Annapurna constructions** which they are not entitled. Hence this public notice is given intimating one and all that our clients and their Firm **M/s.Annapurna constructions** having nothing to do with Shri I.Srinivasa Rao of his father Shri I.Radhakrishna Murthy or M/s.Srinivasa Constructions.

The above notice would reveal that M/s.Annapurna Constructions at Vijayawada as well as Vizag was also treated and considered by all the shareholders/contributories as one entity, that is the reason why public notice was issued intimating all concerned that Vizag firm has nothing to do with I.Srinivasa Rao and I.Radhakrishna Murthy or M/s.Srinivasa Constructions, which was started by these two persons. Public was also informed that these two persons cannot use the name of M/s.Annapurna Constructions.

The correspondence made by Vijayawada firm as well as Vizag firm even while claiming release of security deposit was signed by Y.Raghavaiah representing Vijayawada and Vizag firms. Vijayawada firm has shown Vizag firm as head office in their correspondence. Both the firms have shown the same APGSR/CST number in their letters. Vizag firm is claiming the experience credentials of Vijayawada firm. The partners of Vijayawada firm as well as Vizag firm were contributories when Vizag company was incorporated. By a public notice, Y.Raghavaiah and others made attempts to prevent the partners of Vijayawada firm from using the name, M/s.Annapurna Constructions

claiming exclusive use of the brand name. To what all this adds upto.

In **New Horizons Ltd. V Union of India**[8], the Supreme Court laid down that the Court can see through the Corporate façade by lifting/piercing the corporate veil to ascertain the true nature of the company, especially when the corporate personality is opposed to justice, convenience or interest of the revenue. The question before the Supreme Court was whether the experience of the constituance of a Joint Venture, can be treated as experience of the joint venture. Answering the question in affirmative, the Supreme Court observed that the Court can look behind the façade of the company and its place of registration in order to determine its residence and to know the central management and control. It was further observed.

> Seeing through the veil covering the face of NHL it will be found that as a result of reorganisation in 1992 the Company is functioning as a joint venture wherein the Indian group (TPI, LMI and WML) and Mr Aroon Purie hold 60% shares and the Singapore-based company (IIPL) holds 40% shares. Both the groups have contributed towards the resources of the joint venture in the form of machines, equipment and expertise in the field. The Company is in the nature of a partnership between the Indian group of companies and the Singapore-based company who have jointly undertaken this commercial enterprise wherein they will contribute to the assets and share the risks. In respect of such a joint venture company the experience of the company can only mean the experience of the constituents of the joint venture, i.e., the Indian group of companies (TPI, LMI and WML) and the Singapore-based company (IIPL).

In **Skipper Construction Company (Private) Limited** (supra), the said company (Skipper) became highest bidder in the auction to sell the plot of land by Delhi Development Authority (DDA) in 1980 by quoting Rs.9.82 crores. 25% of the amount was deposited but the balance was not deposited. Repeatedly Skipper asked for extension of time which was granted initially but when such time was not extended and bid was cancelled, Skipper went to the Court in May 1982 and obtained stay of cancellation. While making representations to DDA for extension, Skipper, though possession was not handedover and construction thereon was not permitted, went on selling the place/space in the proposed building. The agreement was revised by the DDA but Skipper violated the same by not paying the first instalment. But, large number of people purchased the space/place in the building. When DDA did not sanction building plans, he went to Delhi High Court in 1990 and

obtained order for commencement of construction on certain conditions. He went to Supreme Court, which permitted Skipper to pay Rs.2.50 crores within one month and Supreme Court prohibited Skipper from inducting any person in the building and creating any rights in favour of third parties. In spite of prohibitory orders, Skipper issued advertisement in leading newspapers inviting persons to purchase the space in the proposed building. S.L.P., was dismissed and DDA re-entered the plot and took possession of the property. By that time, Skipper had collected about Rs.14.00 crores from various parties agreeing to sell by violating the orders of the Supreme Court. Skipper also filed a suit before Delhi High Court for injunction from interfering with alleged title and possession. Delhi High Court stayed re-auction. Aggrieved by which, DDA filed S.L.P., before the Supreme Court. At that stage, the Supreme Court initiated contempt against Tejwant Singh, and his wife Surinder Kaur, Directors of the Skipper and sentenced them to simple imprisonment for one month and pay fine of Rs.50,000/-. However, the sentences were deferred on conditions *inter alia* of the contemnors furnishing bank guarantee in a sum of Rs.11 crores in favour of Registrar General of Supreme Court. They did not comply with those conditions and served their sentences. At that stage, purchasers filed interlocutory applications before the Supreme Court to raise the orders of the Court attaching the properties of DDA. In those applications, DDA filed list of properties held by Tejwant Singh, his wife and their sons and daughters alleging that the wife and children are fronts and devices to defraud and defeat the claims of the purchasers and all the properties attached should be proceeded to realize the amounts necessary for reimbursing the purchasers. This was opposed by the sons of Tejwant Singh contending that the properties belonging to Technological Park Private Limited, Tej Properties Private Limited and Skipper Property Private Limited claiming that Tejwant Singh and Surinder Kaur were not at all concerned with these properties. This aspect of the matter was considered by the Supreme Court employing the principles of piercing the corporate veil. Having noticed that Tejwant Singh and members of his family created several corporate bodies for the purpose of committing illegality or for defrauding others. Therefore, it was held that the Court should ignore the corporate character and will look to the reality behind the corporate veil when the same persons created sever corporate bodies and all of them are controlled by Tejwant Singh alone. The relevant extract from the Judgment in **Skipper Construction Company (Private) Limited** is

supra.

Applying the decision of the Supreme Court in **Skipper Construction Company (Private) Limited** (supra), this Court has no manner of doubt that there is great force in the submission made by the learned senior counsel on behalf of the respondent that Vizag firm always treated as Vijayawada firm as a branch office and the latter treated the former as head office. On occasions more than one, Y.Raghavaiah, who seems to be controlling the business of the firms as well as the company acted on behalf of Vijayawada firm and also claimed the experience/credentials of Vijayawada firm while submitting tenders. In such background, was it not proper for the respondents to assume that Vizag firm and Vijayawada company are sister concerns of Vijayawada firm.

Till decision of the House of Lords in Brind case, the judicial review in the matter of exercising discretion was governed by the principles laid down by Lord Greene in **Associated Provincial Picture Houses Limited v Wednesbury Corporation**[6]. In this case, Wednesbury Corporation while granting permission to Associated Picture House for exhibiting cinematography films imposed condition that children under the age of fifteen years shall not be admitted to any entertainment. The plaintiff sought a declaration that such condition is *ultra vires* Entertainments Act, 1932. Before the Court of Appeal it was *inter alia* argued that such a condition was unreasonable and therefore *ultra vires*. Lord Greene, M.R., after considering the relevant precedents explained the word "unreasonable" in the following manner.

> Expressions have been used in cases where the powers of local authorities came to be considered relating to the sort of thing that may give rise to interference by the court. Bad faith, dishonesty-those, of course, stand by themselves-unreasonableness, attention given to extraneous circumstances, disregard of public policy, and things like that have all been referred to as being matters which are relevant for consideration. In the present case we have heard a great deal about the meaning of the word "unreasonable." It is true the discretion must be exercised reasonably. What does that mean? Lawyers familiar with the phraseology commonly used in relation to the exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to the matter that he has to consider. If he does not obey those

> rules, he may truly be said, and often is said, to be acting "unreasonably." Similarly, you may have something so absurd that no sensible person could ever dream that it lay within the powers of the authority. WARRINGTON,L.J., I think it was, gave the example of red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith.

The above principle has attained immortality in the field of Administrative Law as Principle of "Wednesbury unreasonableness" which is equated to "arbitrariness or irrationality" as a ground of attack upon executive action or legislative action (See **Tata Cellular** and **Om Kumar v Union of India**[9], for short **Om Kumar**). In **Om Kumar**, Supreme Court opined that Wednesbury Principles apply when State action is questioned as arbitrary. When legislative action is challenged as being incompetent or violative of fundamental rights, the Court has to assume a primary role. In such primary judicial review, the test invariably is strict scrutiny test which, as explained by Jagannadha Rao,J in **Om Kumar** as 'proportionality' (SCC para 28) as below.

> By "proportionality", we mean the question whether, while regulating exercise of fundamental rights, the appropriate or least-restrictive choice of measures has been made by the legislature or the administrator so as to achieve the object of the legislation or the purpose of the administrative order, as the case may be. Under the principle, the court will see that the legislature and the administrative authority "maintain a proper balance between the adverse effects which the legislation or the administrative order may have on the rights, liberties or interests of persons keeping in mind the purpose which they were intended to serve". The legislature and the administrative authority are, however, given an area of discretion or a range of choices but as to whether the choice made infringes the rights excessively or not is for the court. That is what is meant by proportionality.

The test is whether a reasonable action in the background of the said facts would have come to such conclusion. The answer must be emphatically in the affirmative. Viewed from any angle, the two firms and the company were acting in unison with *consensus ad idem* and therefore, if there was a fraud committed by Vijayawada firm, the other two cannot feign ignorance and seek exoneration from misdeeds.

Though in the pleadings, two contentions are raised that the impugned order is in violative of principles of natural justice, that the decision was taken after considerable delay, much argument was not made by the learned counsel for the petitioner. It may be noticed that when the fraud vitiates, it unravels everything and the question of applying the principle of *audi alteram partem* and the question of delay would not tilt the discretion of the Court in favour of fraudulent actors.

In the result, for the above reasons, the writ petition fails and is accordingly dismissed with exemplary costs set at Rs.10,000/-.

(V.V.S.RAO,J)

.09.2006
pln

Note: LR copy be marked.
(By order)
pln

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[1] 2003 (2) ALD 392

[2] AIR 1996 SC 2005

[3] (2003) 6 SCC 1

[4] AIR 1986 SC 1370

[5] (1988) 3 Comp.LJ 1 (SC)

[6] 1897 Appeal Cases 22 = (1895-1899) All ER 33

[7] In MOU, party of Second Part is Vizag Firm whereas First Part is Vizag Company

[8] (1995) 1 SCC 478

6 (1947) 2 All ER 640

[9] (2001) 2 SCC 386 = AIR 2000 SC 3689